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## Luke Nnaemeka Ugwu v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-266–06 OF 2017(NGA)
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN CHUNG JJCA
10 JUNE 2019

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*Criminal Law — Drug trafficking — Appellant convicted by High Court and sentenced to death — Appellant appealed against High Court's decision — Whether there was failure by trial judge to adequately and properly consider appellant's defence of innocent carrier — Dangerous Drugs Act 1952, s 39B(1)(a)*

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*Evidence — Adverse inference — Whether adverse inference ought to have been invoked against prosecution for non-calling of witness's statement — Prosecution failed to tender witness' statement made pursuant to s 112 of Criminal Procedure Code — Whether appellant failed to cast reasonable doubt on case for prosecution — Whether conviction of appellant unsafe — Evidence Act 1950, s 114(g)*

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The appellant was charged in the High Court at Shah Alam for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. After a retrial as ordered by the Federal Court, the appellant, on 16 June 2017, was found guilty of the offence and sentenced to death by the High Court. The appellant then filed an appeal to the present court. On 15 May 2012, Mohd Izuan Shah bin Abdul Jalil ('PW6') who was on duty together with Mohamad Izuwan bin Mohd Ali ('PW8') at the customs clearance at KLIA noticed the appellant walking towards the green lane of customs clearance carrying grey wheeled luggage ('the exhibit'). PW6 instructed the appellant to go through the red lane to have his luggage scanned. PW6 noticed a suspicious image on the monitor and PW8 then instructed the appellant to open his luggage at the inspection table and to take out the contents of the exhibit to which the appellant cooperated and obliged. The appellant emptied the contents of the exhibit which contents were made up of clothing items, food items, toiletries and personal effects. As PW6 was unsure of the location of the suspicious items, the exhibit was scanned again for the second time. After the second scan, PW6 again noticed the suspicious image generated by the scanner and then lodged a police report. The appellant was taken to the Cawangan Pemeriksaan Penumpang 1 for further action. The officers from Customs Enforcement Unit opened a panel of the luggage bag which was a panel covering the telescopic handle of the exhibit. The officers found four packets wrapped in carbon papers concealed therein. PW8 conducted a test using test kit and the contents tested positive for

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A methamphetamine. The four packages were sent to Chemistry Department for analysis and it was certified that there were 752.4g of methamphetamine which formed the subject matter of the charge. The learned judge found that the appellant had failed to cast a reasonable doubt on the case for the prosecution. The main issue was whether there was a failure by the trial judge to adequately and properly consider the appellant's defence of innocent carrier. It was also contended by the appellant that whether adverse inference ought to have been invoked against the prosecution for non-calling of witness's statement.

**Held**, allowing the appeal and setting aside the High Court's conviction and sentence:

(1) The defence of innocent carrier could not be an afterthought. The facts and the circumstances show that the defence of innocent carrier was not an implausible one. The factual matrix case did not disclose any circumstances to raise suspicion for the appellant to be put on inquiry. In addition to the foregoing matters which negated any suggestion of anything suspicious of the luggage bag received by the appellant, the conduct of the appellant at all material times was consistent with his lack of knowledge of the existence of the impugned drugs in the bag. There were certainly sufficient and compelling reasons to accept that the appellant was an innocent carrier who could not be guilty of wilful blindness. The failure of the trial judge to address his mind to the defence of innocent carrier mounted by the appellant had gravely prejudiced the appellant. It was certainly a non-direction amounting to a misdirection which had occasioned a miscarriage of justice A proper appreciation of the defence would have concluded that the appellant's defence was more probable and therefore, the presumption under s 37(d) of the DDA would have been rebutted (see paras 27–32).

(2) In order to protect the integrity of the trial process, the prosecution must ensure that all the witnesses offered, which the defence intended to call, were provided to the defence. In the event that for good reason the attendance of the witness offered could not be procured, it was imperative for the prosecution to at least provided s 112 of the Criminal Procedure Code statement to the defence so that if the circumstance so warranted, they could tender such statement for the court's consideration. In the interest of a fair trial, it would not be fair and just for the prosecution to keep the evidence from the defence. The adverse inference under s 114(g) of the Evidence Act ought to have been invoked against the prosecution. In the premise, the invocation of adverse inference against the prosecution casted a doubt on the case for the prosecution such that an order for conviction of the appellant could not be sustained (see paras 38–39).

(3) A miscarriage of justice had occurred such that the conviction of the appellant on the charge was wholly unsafe. The conviction and the death sentence were set aside and the appellant was ordered to be acquitted and discharge (see para 40).

**[Bahasa Malaysia summary**

Perayu didakwa di Mahkamah Tinggi di Shah Alam atas kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Setelah perbicaraan semula seperti yang diperintahkan oleh Mahkamah Persekutuan, perayu, pada 16 Jun 2017, didapati melakukan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Perayu kemudian mengemukakan rayuan. Pada 15 Mei 2012, Mohd Izuan Shah bin Abdul Jalil ('PW6') yang bertugas bersama-sama dengan Mohamad Izuwan bin Mohd Ali ('PW8') di pelepasan kastam di KLIA melihat perayu berjalan menuju ke laluan hijau pelepasan kastam yang membawa bagasi beroda kelabu ('ekshibit'). PW6 mengarahkan perayu untuk melalui laluan merah untuk memeriksa barang-barangnya. PW6 melihat gambar yang mencurigakan di monitor dan PW8 kemudian mengarahkan perayu untuk membuka bagasinya di meja pemeriksaan dan mengeluarkan isi ekshibit dan perayu telah berkerjasama dan mematuhi arahan tersebut. Perayu mengosongkan isi ekshibit yang kandungannya terdiri daripada barang-barang pakaian, barang makanan, peralatan mandian dan barang-barang peribadi. Oleh kerana PW6 tidak pasti akan lokasi barang yang mencurigakan, ekshibit tersebut diimbas kembali untuk kali kedua. Selepas imbasan kedua, PW6 sekali lagi menyedari gambar mencurigakan yang dihasilkan oleh pengimbas dan kemudiannya telah membuat laporan polis. Perayu dibawa ke Cawangan Pemeriksaan Penumpang 1 untuk tindakan selanjutnya. Pegawai dari Unit Penguatkuasaan Kastam membuka panel beg bagasi yang merupakan panel yang menutupi teleskopik ekshibit. Para pegawai menemui empat bungkusan yang dibungkus dengan kertas karbon yang tersembunyi di dalamnya. PW8 melakukan ujian menggunakan kit ujian dan kandungannya diuji positif methamphetamine. Keempat bungkusan itu dihantar ke Jabatan Kimia untuk dianalisis dan diperakui bahawa terdapat 752.4g methamphetamine yang menjadi subjek pertuduhan. Hakim mendapati bahawa perayu telah gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Isu utama ialah sama ada terdapat kegagalan oleh hakim perbicaraan untuk mempertimbangkan pembelaan perayu bahawa dia adalah pembawa yang tidak bersalah secara memadai dan tepat. Ia juga dihujahkan oleh perayu bahawa sama ada terdapat kesimpulan yang memberi kesan buruk terhadap pihak pendakwaan kerana tidak memanggil pernyataan saksi.

**Diputuskan**, membenarkan rayuan dan menolak sabitan dan hukuman oleh Mahkamah Tinggi:

(1) Pembelaan pembawa yang tidak bersalah adalah bukan permikiran terkemudian. Fakta dan keadaan menunjukkan bahawa pembelaan

A pambawa yang tidak bersalah bukanlah suatu yang tidak masuk akal. Fakta matriks kes tersebut tidak mendedahkan keadaan untuk menimbulkan kecurigaan agar perayu diajukan siasatan. Sebagai tambahan kepada perkara-perkara di atas yang menolak apa-apa cadangan mengenai perkara yang mencurigakan beg bagasi yang B diterima oleh perayu, tingkah laku perayu pada setiap masa yang material adalah konsisten dengan kurangnya pengetahuan mengenai keberadaan dadah yang tersangkut di dalam beg tersebut. Secara jelasnya terdapat alasan yang cukup dan meyakinkan untuk menerima bahawa perayu adalah pembawa yang tidak bersalah yang tidak boleh dipersalahkan C dengan salah yang disengajakan. Kegagalan hakim perbicaraan untuk menumpukan perhatiannya kepada pembelaan pembawa yang tidak bersalah yang dihujahkan oleh perayu telah sangat memprejudis perayu. Dengan jelas bahawa ini telah menyebabkan keadilan gagal dilaksanakan. Penghayatan lebih baik kepada pembelaan akan D menyimpulkan bahawa pembelaan perayu lebih meyakinkan dan oleh itu, anggapan di bawah s 37(d) DDA adalah disangkal (lihat perenggan 27–32).

E (2) Pembelaan pembawa yang tidak bersalah adalah bukan permikiran terkemudian. Fakta dan keadaan menunjukkan bahawa pembelaan pambawa yang tidak bersalah bukanlah suatu yang tidak masuk akal. Fakta matriks kes tersebut tidak mendedahkan keadaan untuk menimbulkan kecurigaan agar perayu diajukan siasatan. Sebagai F tambahan kepada perkara-perkara di atas yang menolak apa-apa cadangan mengenai perkara yang mencurigakan beg bagasi yang diterima oleh perayu, tingkah laku perayu pada setiap masa yang material adalah konsisten dengan kurangnya pengetahuan mengenai keberadaan dadah yang tersangkut di dalam beg tersebut. Secara jelasnya terdapat G alasan yang cukup dan meyakinkan untuk menerima bahawa perayu adalah pembawa yang tidak bersalah yang tidak boleh dipersalahkan dengan salah yang disengajakan. Kegagalan hakim perbicaraan untuk menumpukan perhatiannya kepada pembelaan pembawa yang tidak bersalah yang dihujahkan oleh perayu telah sangat memprejudis perayu. H Dengan jelas bahawa ini telah menyebabkan keadilan gagal dilaksanakan. Penghayatan lebih baik kepada pembelaan akan menyimpulkan bahawa pembelaan perayu lebih meyakinkan dan oleh itu, anggapan di bawah s 37(d) DDA adalah disangkal (lihat perenggan 38–39).

I (3) Ketidakadilan telah terjadi menyebabkan sabitan terhadap perayu atas tuduhan itu tidak selamat sepenuhnya. Sabitan dan hukuman mati diketepikan dan perayu diperintahkan untuk dibebaskan dan dibebaskan (lihat perenggan 40).]

**Cases referred to**

*Chan Pean Leon v PP* [1956] 1 MLJ 237 (refd)
*Emmanuel Yaw Teiku v PP* [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd)
*Fakhrurrazi Hasan v PP* [2015] MLJU 2018; [2017] 2 CLJ 125, FC (refd)
*Kobra Taba Seidali v PP* [2014] 2 MLJ 554; [2014] 2 CLJ 12, CA (refd)
*Mat v PP* [1963] 1 MLJ 263 (refd)
*Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
*Pragalathan a/l Balakrishnan v PP* [2018] 3 MLJ 818; [2018] 2 CLJ 420, CA (refd)
*PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 AMR 269, FC (refd)
*PP v Asnawi bin Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41, CA (refd)
*PP v Herlina Purnama Sari* [2016] MLJU 1824; [2017] 1 MLRA 499, FC (refd)
*R v Lambert* [2002] 2 AC 545, HL (refd)
*Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, HL (refd)
*Wong Nam Loi v PP* [1997] 3 MLJ 795; [1998] 1 CLJ 37, CA (refd)

**Legislation referred to**

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1), (1)(a), First Schedule
Evidence Act 1950 s 114(g)
Misuse of Drugs Act 1971

**Appeal from**: Criminal Trial No 45A-244–10 of 2012 (High Court, Shah Alam)

*Wan Azwan Aiman (Aiman Ariff bin Abdul Aziz with him) (Azwan Aiman Fakhrul & Co) for the appellant.*
*Syarifuddin bin Hj Abdul Rasa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Harmindar Singh JCA (delivering judgment of the court):**

**[1]** The appellant was charged in the High Court at Shah Alam for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu pada 15 Mei 2012 lebih kurang jam 9.25 malam di Cawangan Pemeriksaan Penumpang KLIA (CPP1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 725.4 gram, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

A **[2]** After a retrial as ordered by the Federal Court on 29 June 2016, the appellant, on 16 June 2017, was found guilty of the offence and sentenced to death by the High Court. The appellant then filed an appeal to this court. The appeal was heard on 1 April 2019. At the conclusion of the submissions, we unanimously allowed the appeal and set aside the conviction and sentence B passed by the High Court. The appellant was acquitted and discharged. Our reasons for doing so now follow.

THE CASE FOR THE PROSECUTION

C **[3]** The factual matrix of the case falls within a narrow compass. On 15 May 2012, at about 9pm, Mohd Izuan Shah bin Abd Jalil ('PW6') who was on duty together with Mohamad Izuwan bin Mohd Ali ('PW8') at the customs clearance at KLIA noticed the appellant walking towards the green lane of customs clearance carrying a grey wheeled luggage ('exh P34'). D

**[4]** PW6 then instructed the appellant to go through the green lane to have his luggage scanned, to which the appellant obliged and voluntarily placed exh P34 on the conveyor belt for scanning. PW6 noticed a suspicious image on the monitor and PW8 then instructed the appellant to open his luggage at the E inspection table and to take out the contents of exh P34 to which the appellant also cooperated and obliged. The appellant emptied the contents of exh P34 which contents were made up of clothing items, food items, toiletries, and personal effects.

F **[5]** As PW6 was unsure of the location of the suspicious items, exh P34 was scanned again for the second time. After the second scan, PW6 again noticed the suspicious image generated by the scanner and then lodged a police report. The appellant was taken to the Cawangan Pemeriksaan Penumpang 1 ('CPP1') G for further action.

**[6]** At about 11pm, officers from the customs enforcement unit arrived consisting of Muhammad Bukhori Alias ('PW9'), Ahmad Yazid Khan ('PW5') and the late Rasid Ahmad at the CPP1. PW9 then instructed PW8 to pry open H a panel of the luggage bag which was a panel covering the telescopic handle of exh P34. Underneath the said panel, the officers found four packages wrapped in carbon papers concealed therein. PW8 conducted a test using a 'test-kit', and the contents tested positive for 'methamphetamine'.

I **[7]** The appellant and the impugned drugs were brought back by the investigating officer, PW9, for further investigation. The four packages were subsequently sent to the Chemistry Department for analysis. The chemist, Zulkefli bin Mohd Edin ('SP4'), certified the four packages to be 752.4g of methamphetamine which formed the subject matter of the charge.

Methamphetamine is listed in the First Schedule of the Act.

DECISION AT THE END OF THE PROSECUTION'S CASE

**[8]** At the end of the case for the prosecution, the learned trial judge found that the element of possession coupled with knowledge of the illicit drugs had been proved against the appellant by the invocation of the presumption under s 37(d) of the Act. Essentially, the whole substratum of the prosecution's case against the appellant rested solely on the discovery of the impugned drugs concealed underneath the panel covering the telescopic handles of exh P34. The prosecution had relied on the statutory presumption of knowledge and possession under s 37(d) of the Act to bring home the element of possession against the appellant.

**[9]** On the element of trafficking, the learned judge accepted that the act of 'transporting' under s 2 of the Act had been proved against the appellant. The learned judge found that a prima facie case had been made out against the appellant on the charge. Accordingly, the appellant was ordered to enter his defence.

THE DEFENCE CASE

**[10]** The appellant chose to give evidence on oath. There were no other witnesses although the defence had intended to call one other witness who was offered but who then could not be traced by the prosecution. We will come back to this witness later. Essentially, the defence of the appellant was that of an innocent carrier.

**[11]** The appellant testified that he is a student in Malaysia and went back to his hometown in Nigeria to visit his ailing father for a few days. His hometown was about a five hour bus ride from Lagos. A few days before his return to Malaysia, the appellant was in touch with 'Uche' his senior in school while he was in Nigeria. At that point, the appellant had known Uche for about three years.

**[12]** Uche is also connected to the appellant in that he is Oyebu's brother and Oyebu is one of the appellant's housemates in Klang, Selangor. Oyebu is a 23 years old Nigerian student in Malaysia.

**[13]** Before the appellant left for Malaysia, Uche contacted the appellant and insisted that they meet up in Lagos, Nigeria. Since the appellant had to fly back to Malaysia via Lagos, Nigeria, the appellant obliged and spent the night at Uche's house in Lagos. The reason for their meet up was also because Uche wanted the appellant's help to pass a luggage bag to his brother Oyebu. Once he

arrived in Lagos, Uche picked up the appellant at the bus stop. He later passed the luggage bag to the appellant and requested the appellant to pass the same to his brother, Oyebu. The appellant was told that the luggage bag was Oyebu's favourite luggage bag.

**[14]** The appellant testified that when he received the luggage bag, it was Uche who opened the luggage bag and had shown the interior of the bag to the appellant. The appellant saw nothing in the luggage bag and he even personally inspected the same. He testified that at that point in time there was no crack or any odour/smell permeating from the luggage bag. There was also no tampering or adjustment made to the luggage bag as far as the appellant could observe. According to the appellant, at all material times, the condition of the luggage bag was not unusual. There was nothing amiss or unusual which should raise his suspicion.

**[15]** The appellant maintained that he had informed PW6: 'This bag, Uche give me' when the impugned packages were discovered concealed in the luggage bag. This was of course denied by PW6 although PW6 himself admitted in evidence that he could not recall or ascertain with certainty what was said by the appellant to him.

**[16]** The appellant also maintained that he had narrated to PW9 as to the reasons and circumstances that led him to carrying the luggage bag into Malaysia especially in relation to Uche and Oyebu, his housemate. PW9 had flatly denied the same. Notwithstanding PW9's denial of the appellant's version, it turned out that PW9 had in fact made his way to the appellant's house in Klang after the appellant's arrest. PW9 had taken a statement from one of the occupants in the house, a Nigerian national by the name of Ogochukwu Oscar Peter ('Oscar Peter'). The appellant claimed that Oscar Peter was his housemate together with Oyebu and one 'Chinedu'.

**[17]** Now, this Oscar Peter was listed as a prosecution witness. He was not called but offered to the defence at the close of the prosecution's case. When the defence elected to call Oscar Peter, the prosecution failed to secure his attendance although immigration records showed that he had never left the country. The prosecution did not also supply Oscar Peter's s 112 of the Criminal Procedure Code ('the CPC') statement to the defence. Instead, the prosecution recalled PW9 as a rebuttal witness to challenge the appellant's version of events.

FINDINGS OF THE HIGH COURT

**[18]** At the conclusion of the trial, the learned judge found the explanation of the appellant in denying any knowledge of the drugs to be highly improbable. The learned judge found that the appellant had failed to rebut the statutory presumption under s 37(d) of the Act. The learned judge also criticised the appellant's defence for having failed to prove on a balance of probabilities the existence of Oyebu or that Oyebu was in fact his housemate.

**[19]** The learned judge found that the appellant had failed to cast a reasonable doubt on the case for the prosecution. The judge also found that a case beyond reasonable doubt had been made out against the appellant on the offence with which he was charged. The appellant was accordingly convicted and sentenced to death.

THE INSTANT APPEAL

**[20]** Before us, although the petition of appeal contained several grounds, counsel for the appellant submitted that the main issue to be canvassed on appeal was whether there was a failure by the trial judge to adequately and properly consider the appellant's defence of innocent carrier. Allied to this issue was the question of whether adverse inference ought to have been invoked against the prosecution for their non-calling and/or non-tendering of Oscar Peter's s 112 of the CPC statement.

**[21]** In this respect, it was argued by learned counsel for the appellant that the learned trial judge erred when he failed to judicially appreciate the whole of the defence case and did not conduct a maximum evaluation of the evidence adduced. It was submitted that the learned trial judge had not considered at all the appellant's defence of innocent carrier.

**[22]** At the outset, we must observe that this defence of innocent carrier, or sometimes called innocent possession (see *R v Lambert* [2002] 2 AC 545), is merely a label to connote lack of knowledge of any dangerous drugs found in any package or container which the accused person acknowledges that he or she was carrying. Now, of course, any accused person caught in physical control of such a package will invariably deny knowledge or claim ignorance. The community would not be protected if accused persons are let off for merely claiming ignorance. The approach then to be adopted in such cases was advocated by Lord Wilberforce in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 ('Warner') at p 394:

> In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — of possession. It calls for an

A explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make the statutory possession.

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**[23]** We must, however, observe that in *Warner*, Their Lordships were divided on the meaning to be ascribed to the word 'possession'. Part of the reason for the difference in views may be attributed to the lack of clarity in the intention of Parliament as to the mental element required for the offence. The C decision in *Warner* may have inspired the introduction of the new Misuse of Drugs Act 1971 which enabled an accused person to obtain an acquittal in cases of 'innocent possession'.

D **[24]** Back home there is no such controversy. In a nutshell, for the prosecution to secure a conviction under s 39B(1) of the Act, it must be established that the accused was in possession of the impugned drugs by proving custody and control (the actus reus) and knowledge (the mens rea). Possession is presumed by proving custody or control of any dangerous drug E and knowledge of the nature of such drug is then presumed until the contrary is proved by resort to the presumption under s 37(d) of the Act. Thomson J (later Lord President) in the oft-quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 also alluded to the physical element and the mental element to establish possession.

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**[25]** Coming now to the defence of innocent carrier, the authorities suggest that this defence cannot be divorced from the issue of wilful blindness. The law will not protect a person who has wilfully turned a blind eye to obvious circumstances which raise suspicion such that an inquiry is mandated to G obviate the suspicion (see *Public Prosecutor v Herlina Purnama Sari* [2017] 1 MLRA 499). In such a case, the law will impute knowledge. The key threshold element in the doctrine of wilful blindness is that there must first be suspicion followed by (and coupled with) a deliberate decision not to make further investigations.

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**[26]** We must, however, hasten to observe that every case in which the defence of innocent carrier and the question of wilful blindness is asserted will have a different factual matrix. The analysis and outcome will depend on the peculiar facts and circumstances of each case. Direct proof of knowledge is I inherently problematic unless the accused person confesses to knowledge of the illicit drugs. So, in most cases, knowledge can only be inferred from proved facts and circumstances (see *Chan Peon Leon v Public Prosecutor*; *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1998] 1 CLJ 37; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 AMR 269; *Parlan bin*

*Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597 and *Fakhrurrazi Hasan v Public Prosecutor* [2015] MLJU 2018; [2017] 2 CLJ 125). Since the facts and circumstances differ from case to case, an over reliance and fixated approach on the facts of other cases can lead to confusion and sometimes error.

**[27]** Reverting to the instant case, we agreed with the appellant that the learned judge had failed to consider the defence of innocent carrier. With respect, all that the learned judge found was that the version of the appellant was highly improbable and the defence of the appellant was a mere denial and an afterthought.

**[28]** Now, this defence of innocent carrier, in our view, could not be an afterthought. We noted that the case for the defence was put to the relevant witnesses and the record of appeal was replete with suggestions and challenges made to the witnesses on this particular defence. For example, the cross-examination of PW6 is illustrative (at p 19 Appeal Record, Vol 2):

> S: Setuju dengan kebolehan Bahasa Inggeris terhad, dia kata berikut 'This bag, 'Uche' give me'?
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> J: Saya tak ingat.

**[29]** Similar challenges were also made to PW8 at pp 29–30 and to the investigating officer PW9 at p 38 of the same appeal record. These witnesses had, however, denied the appellant ever telling them his version. However, when the appellant had reiterated these matters in his testimony on oath, the suggestions crystallised into evidence and the learned trial judge was duty bound to consider the appellant's defence.

**[30]** The facts and circumstances show, in our view, that the defence of innocent carrier was not an implausible one. Significantly, the factual matrix in the present case did not disclose any circumstances to raise suspicion for the appellant to be put on inquiry. There was nothing intrinsically sinister about Uche's request for the appellant to carry the bag and to pass the same to Oyebu, the appellant's housemate. The appellant had also inspected the bag and found it to be empty and unsuspicious. It was also significant that the packages were ingeniously and cunningly concealed behind the panel covering the telescopic handle in the bag exh P34. This was readily conceded by the prosecution witnesses and noted by the learned judge.

**[31]** In addition to the foregoing matters which negated any suggestion of anything suspicious of the luggage bag received by the appellant, the conduct of the appellant at all material times was consistent with his lack of knowledge

of the existence of the impugned drugs in the bag exh P34. In our view, there were certainly sufficient and compelling reasons to accept that the appellant was an innocent carrier who could not be guilty of willful blindness.

**[32]** In the circumstances, we had serious misgivings as to whether the salutary direction in *Mat v Public Prosecutor* [1963] 1 MLJ 263 had been followed by the learned judge. The appellant had been deprived of due consideration of his defence. In our respectful view, the failure of the learned trial judge to address his mind to the defence of innocent carrier mounted by the appellant had gravely prejudiced the appellant. It was certainly a non-direction amounting to a misdirection which had occasioned a miscarriage of justice. A proper appreciation of the defence would have concluded that the appellant's defence was more than probable and therefore the presumption under s 37(d) of the Act would have been rebutted.

**[33]** Although this would be sufficient to dispose of this appeal, there was another serious infirmity which we were compelled to address. This was the failure of the prosecution to secure the attendance of the witness Oscar Peter or at least to furnish the defence with the s 112 of the CPC witness statement of that witness who was offered to the defence.

**[34]** Now, this Oscar Peter was certainly not an irrelevant witness as the learned judge seemed to think. It was the appellant's defence that Oscar Peter was also living with the appellant in Taman Sentosa, Klang. As such, this witness would be the best person to verify and substantiate the existence of Oyebu, the intended recipient of the bag exh P34. It was in evidence that the investigating officer (PW9) had himself gone to the appellant's house in Klang and had arrested and even recorded Oscar Peter's statement for the purposes of investigation.

**[35]** The law in this regard appears settled. This court in *Public Prosecutor v Asnawi Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41 held that when witnesses were offered to the prosecution by the defence, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution failed to fulfil that obligation, the accused must be acquitted. The court observed (at p 49):

> [22] Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.
>
> [23] Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case

involving the liberty of an individual. We have provisions in our laws to ensure that this would not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

**[36]** In *Pragalathan a/l Balakrishnan v Public Prosecutor* [2018] 3 MLJ 818; [2018] 2 CLJ 420, this court also noted that if the prosecution had told the trial judge that a particular witness offered to the defence cannot now be located, the prosecution could have at least provided the s 112 of the CPC statement to the defence so that they could then have some opportunity to deal with it or even introduce it into evidence if the law permitted it.

**[37]** In this context as well, this court in *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554; [2014] 2 CLJ 12 had occasion to hold that failure of the prosecution to produce the witness or hand over a copy of the witness statement to the defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.

**[38]** In our view, in order to protect the integrity of the trial process, the prosecution must ensure that all witnesses offered, which the defence intend to call, are provided to the defence. In the event that for good reason the attendance of the witness offered cannot be procured, it is imperative for the prosecution to at least provide the s 112 of the CPC statement to the defence so that if the circumstances so warrant, they could tender such statement for the court's consideration.

**[39]** In the interests of a fair trial, it would not be fair and just for the prosecution to keep such evidence from the defence. If the circumstances so warrant, an adverse inference could be drawn for the prosecution's failure in this regard. In our view, the present case was one where adverse inference under s 114(g) of the Evidence Act 1950 ought to have been invoked against the prosecution. In the premises, the invocation of adverse inference against the prosecution further cast a doubt on the case for the prosecution such that the order for conviction of the appellant could not be sustained.

CONCLUSION

**[40]** In the circumstances, and for the reasons we have provided, we were satisfied that a miscarriage of justice had occurred such that the conviction of the appellant on the charge was wholly unsafe. Accordingly, we had set aside the conviction and death sentence of the High Court and ordered the appellant to be acquitted and discharged.

*Appeal allowed; conviction and sentence of High Court set aside.*

Reported by Mohd Kamarul Anwar